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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 761

NORMAN M. LITTELL, *Petitioner*,

v.

STEWART L. UDALL, Secretary of the Interior.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, PRINTING, INC., WASHINGTON, D. C.

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NORMAN M. LITTELL, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on September 2, 1966.

OPINIONS BELOW

The opinion of the court below on the (first) appeal from the preliminary injunction (R. 351-62) is reported at 338 F. 2d 537.[1] The opinion of the district court following trial

[1] "R." refers to the Joint Appendix on the second appeal, which consists of 5 volumes and a supplemental volume, all paged consecutively. A topical table of contents of the Joint Appendix appears at R. 2689-92 of the supplemental volume.

on the merits (R. 2610-29), its opinion on the contempt proceeding (R. 2629-42b), and its findings of fact and conclusions of law (R. 2643-79), are all reported at 242 F. Supp. 635. The opinion of the court below on the (second) appeal from the permanent injunction appearing at R. 2683-87 has not yet been reported; it is set forth below in Appendix A, pp. A1-A16.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A17) was entered on September 2, 1966. A timely petition for rehearing in banc was denied on October 14, 1966 (Appendix B(2), *infra*, p. A17). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior has power to cancel administratively an Indian contract once approved by him pursuant to R.S. § 2103 as amended (25 U.S.C. § 81).

2. Whether the Secretary of the Interior has power, under the generalized provisions of R.S. §§ 441 and 463 (5 U.S.C. § 485; 25 U.S.C. § 2), to cancel administratively an Indian contract once approved by him pursuant to R.S. § 2103, in the face of the circumstances that Congress enacted additional legislation (now contained in R.S. § 2103) to condition the validity of all Indian contracts on prior secretarial approval, that thereafter Congress conferred specific authority on the Secretary to cancel administratively a limited class of valid Indian contracts by the Act of April 29, 1874, c. 135, 18 Stat. 35 (concededly inapplicable here), that in the more than 90 years that R.S. § 2103 and its predecessors have been in effect no Secretary prior to the present instance had ever undertaken administrative cancellation of an approved Indian contract, and that here the Secretary did not undertake the administrative can-

cellation of the present Indian contract until after the non-Indian party to that contract had refused to resign.

3. Whether, if the Secretary of the Interior indeed has power to cancel administratively an approved Indian contract specifically providing for termination only by the governing body of the Indian tribe concerned, he may cancel for facts whose lack of materiality is shown by the circumstances that they were contemporaneously known to and approved by the Secretary, and were thereafter put forward only as grounds for an ultimate set-off, and were never relied on as grounds for cancellation until after the non-Indian party to the contract had refused to resign.

STATUTES AND NAVAJO TRIBAL CODE PROVISIONS INVOLVED

The provisions of the Federal statutes and of the Navajo Tribal Code involved in this case are set forth in Appendix C, *infra*, pp. A18-A25.

STATEMENT

A. Succinct summary of the controversy

Petitioner has been General Counsel and Claims Attorney of the Navajo Tribe of Indians since 1947, and is presently serving under a contract expiring on August 7, 1967, which, together with 12 amendments, was duly approved by the Secretary of the Interior pursuant to R.S. § 2103 (25 U.S.C. § 81; *infra*, pp. A19-A21). This contract contains a provision for termination by the Navajo Tribal Council for good cause shown, disputes as to the sufficiency of the cause to be determined by the Secretary, but contains no provision conferring on the Secretary any right to terminate. (Fdgs. 1-5, R. 2643-44.) The Navajo Tribal Council is the governing body of the Navajo Tribe, with sole power to select attorneys, and has neither terminated the contract nor requested anyone else to do so. (Fdgs. 6-8, R. 2644; 2 N.T.C. §§ 101, 1173(c), *infra*, pp. A24, A25.)

Nor does the record show that the Secretary ever recommended termination to the Council, as his Solicitor originally suggested (R. 217).

In consequence of complaints by the Chairman of the Council and of the Advisory Committee selected by the Chairman, the latter characterized by the Secretary as "a stacked body" (R. 1656), neither of whom had power to terminate the contract, and after dealings with both to circumvent the Navajo Tribal Council, which did have such power, the Secretary called on petitioner to resign as General Counsel but not as Claims Attorney. When petitioner then refused to resign, the Secretary undertook to cancel the contract, a step impelled by such refusal and by "the realization that a majority of the Navajo Tribal Council were favorable to [petitioner] and would not vote to terminate his contract." (Fdgs. 8-17, 21-39; R. 2644-47, 2648-54; the quotation is from Fdg. 36 at R. 2652.)

Thereupon petitioner brought suit and obtained a preliminary injunction restraining the Secretary from terminating or cancelling the contract, on the footing that the latter lacked power to do so (Conc. 5, R. 348-49), and from suspending or otherwise improperly interfering with petitioner's performance thereunder (Fdg. 41, R. 2654).[2]

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[2] We omit as only peripherally pertinent at the present juncture discussion of (1) the portion of the preliminary injunction dealing with prevention of the ordinary course of payments pursuant to R.S. § 2104 (25 U.S.C. § 82), with the related sequel of the Secretary's motion to "clarify" the injunction (R. 1031-1072), the similarly related findings regarding the non-payment of petitioner's vouchers (Fdgs. 107A-116, R. 2672-74), and the voucher provisions of the permanent injunction (¶ II, R. 2685-86), the terms of which rest on, e.g., *Miguel* v. *McCarl*, 291 U.S. 442, 456; (2) the Secretary's defense of failure to exhaust administrative remedies, not abandoned until after the district court found that petitioner "could not in point of actual fact have obtained relief from his suspension within the Department of the Interior after" the date of the Secretary's purported termination (Fdgs. 43-48, R. 2655-56); (3) the post-injunction ejection of petitioner from

That preliminary injunction was affirmed on appeal (*Udall v. Littell*, 338 F. 2d 537), the court below saying (pp. 540, 542):

> "The Secretary can point to no statute applicable here which confers upon him any such authority.
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> * * * * * *
>
> "We have been shown no basis upon which the Secretary rather than the Tribal Council might declare the contract at an end. We have discovered no source of power—and none has been cited to us—which vests in the Secretary a predicate for rescission by him of his previous approval granted pursuant to 25 U.S.C. § 81 (1958)."

B. Pertinent facts developed at the trial

Thereafter, following certain interlocutory proceedings referred to in footnote 2, the case was tried on the merits for two full court weeks (see R. 2691-92 for references). Insofar as now material, the following facts were developed at the trial.

Solicitor Barry of the Interior Department, who in October 1963 had advised the Secretary that he should recommend termination of petitioner's contract to the Navajo Tribal Council (Fdg. 33, R. 2651-52), in November 1963 advised the Secretary to terminate the contract on his own (Fdg. 38, R. 2652-53); no new authorities were adduced to

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Navajo Tribal Council meetings and the resultant contempt proceeding (Fdgs. 82-100A, R. 2666-70; R. 367-1023 and related matters indexed at R. 2690-2691; contempt opinion, R. 2629-2642b; and district court's subsequent comment (R. 2614) that "if all of the evidence that was introduced by both parties in the present action had been available for the Court's consideration at the contempt proceeding, the conclusion reached by the Court in that case undoubtedly would have been different"); and (4) the Secretary's part in "the almost total destruction of the Navajo Tribe's Legal Department and the isolation and circumvention of [petitioner] as its general counsel as a result of the * * * Secretary's announced 'policy to get him out'" (Fdgs. 101-107, R. 2670-71).

support the change of position, and the record establishes that the November Memoranda were prepared at the Secretary's direction when petitioner refused to resign and it became apparent that a majority of the Tribal Council were favorable to him (Fdg. 36, R. 2652). The district court said in its opinion (R. 2618) that "it appears that the change in attitude by Barry and the Secretary was not motivated by a recognition of any existing legal power to cancel the contract, but their creation of an assumed power not authorized by law but only motivated by their desire to 'get rid of Littell.' "

The record further shows that the purported termination of petitioner's approved contract by the Secretary represented the first instance in the more than 90 years that R.S. § 2103 and its predecessors have been in effect that any Secretary had ever undertaken to cancel administratively any approved Indian contract (Fdg. 43, R. 2655).

Of the three charges levelled at petitioner in the Solicitor's memoranda on which the Secretary acted (Fdgs. 38-39, R. 2652-54, incorporating by reference R. 221-40), only one was relied on by the court below as justifying cancellation (*infra*, pp. A11-A16). In order not to lengthen the present petition unduly, we summarize in Appendix D, *infra*, pp. A26-A30, the substance of the other two and their disposition by the district court, and set forth here only the third.

Petitioner's basic contract recognized a distinction between general counsel services, compensated by retainer, and claims services, compensated only by a percentage of recovery (Fdg. 56, R. 2658); when the Secretary urged that petitioner resign as General Counsel but remain as Claims Attorney in the course of their October 11, 1963, conference, petitioner was being compensated at the rate of $35,000 per annum in the former capacity (Fdg. 4, R. 2643) but "as Claims Attorney had in 16 years never received a penny of compensation for his labors in that capacity" (Fdg. 35, R. 2652).

Many of petitioner's subordinates were not permitted to be employed on claims cases, but these restrictions were later removed in respect of two of his assistants, Messrs. McPherson and Wolf (Fdgs. 56-57, R. 2658).

Many cases handled by petitioner on behalf of the Navajo Tribe of Indians had both claims and general counsel aspects (Fdg. 58, R. 2658-59). The district court found (Fdg. 59, R. 2659) that—

> "[Petitioner] encountered shortages in legal personnel and difficulty in training young lawyers coming to Window Rock, Arizona, in the intricacies of Indian law and Indian affairs. [Petitioner] has sometimes used and condoned the use of general counsel attorneys on claims litigation."

In October 1963, Solicitor Barry suggested that claims fees due under the contract would be subject to set-off accordingly, but in November he shifted to reliance on claims use of general counsel attorneys as a ground for terminating the contract (Fdg. 60, R. 2659), and the Secretary relied on Barry's November Memoranda in undertaking to do so (Fdg. 39, R. 2653-54).[3]

At the trial there were introduced into evidence the monthly service records of five of petitioner's assistants (Def. Ex. 4-8, R. 1216). These showed in great detail on a day-to-day basis the nature of the work done by each

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[3] The district court found (Fdg. 62, JA 2659) that the November Memoranda did not point out the inconsistency between the assertion just noted insofar as it involved general counsel attorneys' participation in *Healing* v. *Jones* and Barry's further accusation that *Healing* v. *Jones* had been improperly classified as a claims case, as to which see Appendix D, *infra*, pp. A27-A30.

A similar inconsistency appears in paragraphs 2-15 of Def. Ex. 1 (R. 1889 *et seq.*), the Advisory Committee resolution of June 25, 1963, that was prepared at the Secretary's suggestion (Fdg. 24, R. 2649) and that triggered the investigatory phase of the present controversy (Fdgs. 28-29, R. 2650).

on pending matters, and since every such record had been attached to the attorneys' monthly pay vouchers, each reflected approval both by the Chairman or Vice-Chairman of the Navajo Tribal Council and by a certifying officer of the Bureau of Indian Affairs. The lawyers concerned were Messrs. McPherson and Wolf, who in due course were authorized to work on claims cases (Fdg. 57, R. 2658), as well as Messrs. Davis, Doherty, and Brannon. There were also introduced documents purporting to be tabulations of the monthly service records (Def. Ex. 9-13, R. 1229).

The district court made no finding regarding the extent that general counsel attorneys were used on claims cases, saying (Fdg. 62A, R. 2659-60):

> "In view of the circumstances that [petitioner] has yet to submit a bill for services in *Healing* v. *Jones*, that the Tribe's governing body, the Navajo Tribal Council, has never complained of any irregularities in respect of the use of general counsel attorneys on claims work in the 20 months that have elapsed since those charges were first made by the Advisory Committee, and that a determination of whatever setoff or reimbursement may be due by reason of such use involves not only the examination of voluminous service records but also the separation of the entries thereon into claims and general counsel aspects of the several cases, no findings are being made concerning the extent of such use."[4]

After finding that petitioner "has sometimes used and condoned the use of general counsel attorneys on claims litigation" (Fdg. 59, R. 2659), the district court went on to say in its opinion (R. 2626) that "In fact, circumstances

[4] The offer of the summaries (Def. Ex. 9-13) was objected to because of inaccuracy, in that those summaries failed to reflect separation of the work shown on the service records into claims and general counsel matters (R. 1225-29, 1882). Such a breakdown could easily have been made on the footing set forth in Fdg. 58, R. 2658-59.

made such diversion unavoidable. There has been no harm done to the Tribe." These latter statements had ample record support (R. 1576-87).

The district court then held that the use of general counsel attorneys on claims matters, which was in furtherance of the interests of the Navajo Tribe of Indians, was in any event not good cause for termination of the contract (Conc. 11, R. 2677), and that "To the extent that the Navajo Tribe of Indians is entitled to compensation by reason of any irregularity in the use of general counsel attorneys on claims cases, either by way of setoff or reimbursement, its interests will be amply and adequately protected if such compensation is reflected in the ultimate fixing of the fees due [petitioner] when his claims work has been successfully concluded, as indeed the Solicitor suggested in October 1963" (Conc. 12, R. 2677).

Following the close of the trial, the district court wrote an opinion (242 F. Supp. 635; R. 2610-29), made detailed findings of fact and conclusions of law that did not in any sense simply rubber-stamp petitioner's requests (R. 2643-79), and entered a comprehensive permanent injunction designed to prevent all of the activities shown by the record to have occurred during the pendency of the preliminary injunction (R. 2683-87; see R. 2619-20).

The district court followed the court below in its original holding that the Secretary lacked statutory power to terminate the contract (R. 2615-20; Conc. 5, R. 2676), held that all the charges of misconduct on petitioner's part that the Secretary had made, including additional allegations first advanced at the trial, were severally without foundation (R. 2621-26; Fdgs. 49-81, R. 2656-66; Conc. 10-17, R. 2676-78), concluded, on the basis of every bit of evidence in the case (Fdg. 79, R. 2665), that petitioner, over what was then a period of seventeen and a half years' service as General Counsel, "has at all times represented his client competently, faithfully, loyally and honestly" (Fdg.

80, R. 2665), and reaffirmed the district court's earlier conclusion that petitioner is "a man of outstanding integrity and character" and "an outstanding lawyer" (Fdg. 81, R. 2665-66).

The district court was further of opinion (R. 2627) that petitioner, "after more than seventeen years of hard work and faithful service in behalf of the Navajos, and after having contributed so much to helping the Tribe advance from a position of poverty to that of great wealth, was entitled to better treatment and consideration by those in a position of authority than he received.

"And the Court can only characterize that treatment, under the facts and circumstances of this case, as brutal and shabby."

C. Proceedings in the court below

The Secretary's appeal from the permanent injunction was heard by a differently constituted division of the court below, which, without setting aside a single one of the district court's findings of fact, reversed its decree and ordered judgment entered for the Secretary. It held, on the basis of the precise authorities presented to and rejected on the first appeal, that the Secretary did have power to cancel the contract administratively, saying (*infra*, pp. A10-A11):

> "We hold that the broad authority vested by Congress in the Secretary to oversee Indian affairs, particularly in light of the long history of concern over tribal relations with attorneys, includes the power to cancel contracts between a tribe and its attorneys for cause by appropriate administrative action. The Secretary's approval of the contract is no bar to such cancellation for cause."

Except insofar as a rehearing in banc was denied, with four of the eight active judges of the court below not participating in such denial (Appendix B(2), *infra*, p. A17), the

differences in the two opinions below with respect to the scope of the Secretary's powers were never reconciled.

The court below on the second appeal (*infra*, pp. A14-A16) found justification for the Secretary's termination of the contract in the finding (Fdg. 59, R. 2659) that petitioner "has sometimes used and condoned the use of general counsel attorneys on claims litigation." It held, on the footing that only the plaintiff had knowledge of the amount of claims work done by the general counsel attorneys and of "his failure to make full disclosure to the client and the Indian Commissioner," that he was guilty of such a breach of his fiduciary relationship as to constitute adequate grounds for termination of his contract—and this in the face of the Tribal and Indian Office approval shown on each monthly service record.[5]

The court below ignored the district court's opinion (R. 2626) that "In fact, circumstances made such diversion unavoidable. There has been no harm done to the Tribe," and dismissed as inadequate the district court's conclusions that (Conc. 11-12, R. 2677), under the facts involved, the use of general counsel attorneys on claims cases did not constitute good cause for cancellation and that either an offset or reimbursement would adequately protect the Tribe. The court below reached that result even though the offset solution was what the Solicitor had originally recommended (Fdg. 60, R. 2659), at a time when the Secretary only wished petitioner to resign as General Counsel and was perfectly willing for him to remain as Claims Attorney (Fdg. 35, R. 2652); and this even though it was only after petitioner refused to resign (Fdg. 36, R. 2652) that the set-off solution was abandoned and that the use of general

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[5] In view of their bulk, the monthly service records (Def. Ex. 4-8) were not printed as a part of the Joint Appendix used below. At the trial the Secretary's counsel admitted that the records showed approval of the services rendered, but urged that the Secretary had the right thereafter to hold otherwise (R. 1389-91).

counsel attorneys on claims matters was fashioned into a reason for cancelling the contract (Fdg. 60, R. 2659).

The court below did not consider either the extent of the use of general counsel attorneys on claims cases or whether in all the circumstances such use had inured to the benefit of the Tribe.

REASONS FOR GRANTING THE WRIT

The decision below affects—and impairs—every Indian contract now in existence or which may be made hereafter. It broadens significantly the disability to make contracts under which every Indian citizen and every Indian tribe now suffer, and strikes a serious and indeed a lethal blow at Navajo self-government, this in the teeth of the Congressional directive to advance "the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship" (25 U.S.C. § 636, *infra*, pp. A18-A19).

More than that, the decision below disregards the settled contrary legislative and administrative construction over a period of nearly a century respecting the Secretary's powers over Indian contracts, fashions a new and plainly untenable approach to the interpretation of specific statutory grants of power, and then proceeds to dispose of the merits of the controversy on a ground that the Secretary advisedly refrained from taking until petitioner refused to resign—and does so in disregard of every finding of fact made by the district court after a two-week long trial, no single one of which was set aside on appeal.

First. The conclusion of the court below that the Secretary's generalized "supervision of public business relating to * * * Indians" (R.S. § 441; 5 U.S.C. § 485; *infra*, p. A18), is sufficient, even when joined with the Commissioner of Indian Affairs' "management of all Indian affairs and of all matters arising out of Indian relations" (R.S. § 463; 25 U.S.C. § 2; *infra*, p. A18), to cancel administratively an

Indian contract once approved pursuant to R.S. § 2103 (25 U.S.C. § 81; *infra*, pp. A-19-A21) flies in the face of nearly a century of both legislative and administrative practice—and runs counter as well to hitherto accepted judicial rules of statutory construction.

R.S. § 463 dates from 1832, R.S. § 441 from 1849, yet their combined terms were never deemed broad enough to authorize the Secretary without more to cancel or nullify all Indian contracts whatever. It was not until the 1870s that Congress first required Indian contracts to be approved by the Secretary as a prerequisite to their validity (Sec. 3 of the Act of March 3, 1871, c. 120, 16 Stat. 544, 570-571; Act of May 21, 1872, c. 177, 17 Stat. 136), provisions that, insofar as here relevant, now appear in R.S. § 2103 (25 U.S.C. § 81).

But all these enactments operated prospectively, so that contracts in force before the effective dates of the several statutes remained valid despite the absence of prior secretarial approval. If the Secretary indeed had power by reason of the foregoing provisions, general as well as specific, to cancel valid contracts administratively, as the court below has indeed held in this case, then he could after 1872 without further legislation have proceeded to review every existing contract and to cancel any that did not measure up to his notions of what Indian welfare required.

But Congress was of opinion that a specific further grant was needed to confer such additional power. By Section 1 of the Act of April 29, 1874, c. 135, 18 Stat. 35 (*infra*, pp. A21-A24), Congress declared that no private Indian contracts or agreements prior to that date should be recognized unless they were in writing and approved by the Secretary. Section 5 made it the duty of the Secretary to investigate all such existing contracts. And Section 4 laid down the guidelines: No contract was valid unless the Secretary on full examination of all supporting documents should

consider it just and reasonable and not tainted with fraud and not exorbitant in its demands; contrariwise, if the Secretary on such consideration should consider any pre-1872 contract fraudulent or exorbitant, he should reject it.

Otherwise stated, Congress considered that the Secretary required express statutory authority in addition to what he already had under R.S. §§ 441, 463, and 2103 in order to cancel existing contracts even for fraud or extortion. What the Secretary purported to find in the present case on November 1, 1963, fell far short of either; but even assuming the very worst for purposes of the present discussion, that worst would have been of no avail in the absence of additional legislation.

These are not revelations vouchsafed only to the present petitioner. From 1871, when the first Indian contract legislation was enacted, until 1963, when the Secretary acted in this case, no other Secretary ever found in any statute administrative power to cancel an approved Indian contract. The present case thus falls within Chief Judge Cardozo's comment, "Not lightly vacated is the verdict of quiescent years" (*Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884).

More than that, the present record plainly shows that even in this case the Secretary did not undertake administrative cancellation until after petitioner refused to resign (Fdgs. 35-36, R. 2652; opinion, R. 2616).[6]

Consequently the construction placed by the court below (*infra*, pp. A8-A11) on the Act of April 29, 1874, just discussed, which affirmatively conferred the power of admin-

[6] It seems sufficient to say of the discussion of 25 U.S.C. § 81a by the court below (*infra*, pp. A9-A10, note 19) that § 81a has been consistently read differently by the Interior Department (Cohen, *Handbook of Federal Indian Law* [1941] 281; U. S. Dept. Int., *Federal Indian Law* [1958] 485-486), and that the appearance of this argument in a footnote rather than in the body of the opinion hardly reflects burning faith in its weight.

istrative cancellation in respect of a limited class of valid Indian contracts, would not only render that Act completely nugatory, but such construction is moreover diametrically at variance with the standard of statutory interpretation earlier applied by the same tribunal in similar situations.[7]

It is not now necessary to extend the discussion. The decision below is so fraught with dangerous consequences, and so contrary as well to many decades of consistent legislative, judicial, and administrative construction in the area of Indian relations, that it should not be allowed to stand unreviewed.

Second. The court below found justification for petitioner's removal by the Secretary in the finding (Fdg. 59, R. 2659) that the former "has sometimes used and condoned the use of general counsel attorneys on claims litigation," and dismissed as inadequate the district court's conclusions (Conc. 11-12, R. 2677) that those facts did not justify cancellation and that an offset or reimbursement would adequately protect the Tribe.

The district court's conclusions were not subsequently rationalized; quite to the contrary, its solution was precisely what the Solicitor had originally recommended to the Secretary (Fdg. 60, R. 2659), as indeed the opinion below recognizes (*infra*, p. A5). At that juncture all the Secretary asked was that petitioner resign as General

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[7] "Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." *Alcoa S.S. Co.* v. *Federal Maritime Comm.*, 348 F. 2d 756, 758 (D.C. Cir.). "Congress has repeatedly demonstrated that it knows how to make an express delegation of authority to issue interim cease and desist orders when it so desires." *Trans-Pacific Conf.* v. *Federal Maritime Bd.*, 302 F. 2d 875, 880 (D.C. Cir.). "We conclude that when Congress wishes to confer such authority, it says so." *Alaska Airlines* v. *CAB*, 257 F. 2d 229, 230 (D.C. Cir.), certiorari denied, 358 U.S. 881.

Counsel but remain as Claims Attorney (Fdg. 35, R. 2652). Only after petitioner refused to resign did the Secretary abandon the set-off solution, and inflate the use of general counsel attorneys on claims matters into a reason for terminating the contract (Fdg. 60, R. 2659; Fdg. 36, R. 2652).

As a matter of law, such breaches as occurred were not sufficiently material to support termination of the entire contract.[8] As a matter of fact, the Secretary's own exhibits and the admissions of his counsel at the trial belie the accusations of concealment on which the court below relied.[9] And the district court's statement (R. 2626)—"In fact, circumstances made such diversion unavoidable. There has been no harm done to the Tribe"—had ample record support (R. 1576-87) and was left untouched on appeal, a circumstance that removes all basis for the homilies on fiduciary obligation that are contained in the opinion below (*infra*, pp. A13-A16).[10]

On the basis of every bit of evidence in the case (Fdg. 79, R. 2665), the district court concluded that petitioner for more than 17 years "has at all times represented his client competently, faithfully, loyally, and honestly" (Fdg. 80, R. 2665), and reaffirmed its earlier conclusion that

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[8] *Restatement of Contracts*, §§ 274-275; 6 Williston, *Contracts* (Jaeger's 3d ed.) §§ 841-843; *LeRoy Dyal Co.* v. *Allen*, 161 F. 2d 152 (C.A. 4); *Buckner* v. *Tweed*, 157 F. 2d 211, 213, certiorari denied, 330 U.S. 825.

[9] For the showing in the exhibits, see pages 7-8, *supra*. Counsel's admission that the Interior Department had actually approved the services there disclosed is at R. 1389-91. The unfounded charge of concealment appears *infra* at p. A14.

[10] Inasmuch as the court below made no effort to rest its result on the other charges made by the Secretary, all of which the district court severally found and held to be unfounded, there is no need on our part to reargue their groundlessness now. The facts concerning those other charges, as well as their treatment by the district court, are summarized in Appendix D, *infra*, pp. A26-A30.

petitioner is "a man of outstanding integrity and character" and "an outstanding lawyer" (Fdg. 81, R. 2665-66). The district court was further of opinion (R. 2627) that petitioner "was entitled to better treatment and consideration by those in a position of authority than he received.

"And the Court can only characterize that treatment, under the facts and circumstances of this case, as brutal and shabby."

In the light of the district court's explicit and detailed findings (R. 2643-75) and opinion (R. 2610-29), the opinion of the court of appeals leaves the reader of all three with the uncomfortable but distinct impression that the latter tribunal, while swallowing the camel of the brutal and shabby treatment of petitioner, has strained at the gnat of an unavoidable diversion of general counsel attorneys in claims matters prosecuted for the benefit of the Tribe, and has on that ground sustained the Secretary's termination of the contract in the face of the indisputable fact that the Secretary himself did not originally consider such diversion as warranting more than an eventual set-off (Fdgs. 35-36, R. 2652; Fdg. 60, R. 2659).

In short, this case is all too reminiscent of refusal to renew a Negro teacher's contract on the footing of alleged minor infractions of school rules where such refusal is in fact grounded on her civil rights activities. *Johnson* v. *Branch,* 364 F. 2d 177 (C.A. 4), pending on petition for certiorari, No. 719, this Term.

Third. The opinion below, disregarding the Congressional command (25 U.S.C. § 636; *infra,* pp. A18-A19) to advance "the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship," has struck a hard and, it may well be, fatal blow at Navajo self-government. Cf. *Williams* v. *Lee,* 358 U.S. 217, 221-223.

It is clear that the Navajo Tribal Council, the governing body of the Tribe, has sole power under the contract as

written—and as approved by the Secretary—to terminate it on behalf of the Tribe (Fdg. 5, R. 2643-44). It is equally clear that the Tribal Council has consistently supported petitioner and has never at any time either sought to terminate the contract by itself or requested the Secretary or any one else to do so (Fdg. 6-7, R. 2644).

It is similarly clear that it was the Secretary himself who suggested that the Tribal Council be by-passed (Fdg. 24, R. 2649; R. 2612, 2628), and the district court found as a fact that the Secretary only undertook to cancel the contract on his own because petitioner refused to resign and because the Tribal Council would not vote to terminate (Fdg. 36, R. 2652). More than that, the Chairman, who had no power of his own in the premises (Fdg. 33, R. 2651-52), nonetheless was at pains, with full assistance from the Secretary's subordinates, never to permit the Tribal Council to pass on the issues raised by the Secretary (Fdgs. 85-93, R. 2666-68).

We agree with the district court that "Indian self-government should be a meaningful goal rather than an empty phrase" (R. 2628). It is a goal that would have been reached under the district court's views; it is a goal impossible of attainment under the course of circumventing the Navajo Tribe's governing body that is reflected in this record and that now stands approved by the court below.

We also agree with the court of appeals that (*infra*, p. A14) "The interests of the Navajos demanded that the controversy cease." But to terminate the controversy by cancelling the contract on the footing on which the Secretary acted here is precisely like ending a controversy over school integration by closing the schools. *Cooper* v. *Aaron*, 358 U.S. 1; *Griffin* v. *School Board*, 377 U.S. 218.

The first statute that required approval of Indian contracts by the Secretary and the Commissioner of Indian

Affairs was the Act of March 3, 1871, now contained in R.S. § 2103 (25 U.S.C. § 81; *infra*, pages A19-A21). The Interior Department has said of that statute (Cohen, *Handbook of Federal Indian Law* [1941] 77; U. S. Dept. Int., *Federal Indian Law* [1958] 114):

> "Since many of the grievances of the Indians were grievances against these officers, the Indians were effectually deprived by this statute of one of the most basic rights known to the common law, the right to free choice of counsel for the redress of injuries."

Thus, if the opinion below is permitted to stand, the real losers will be, not the present petitioner, but every Indian and every Indian tribe in the United States.

Fourth. Simply to show that the question has not been overlooked, we point out that this case is in no danger of becoming moot. The contract in question does not expire until August 7, 1967 (Fdg. 3, R. 2643), and with the record in print and the further proceedings contained in the appendices to this petition, we believe that the case can without undue pressure be both argued and decided during this Term. In the event that certiorari is granted, we are prepared to file petitioner's brief on the merits 30 days after the Court rules on the petition.

But even if decision were not to come until next Term, the controversy would in no sense be moot. Here, as in *Pollard* v. *United States*, 352 U.S. 354, 358; *United States* v. *Morgan*, 346 U.S. 502, 512-513; and *Fiswick* v. *United States*, 329 U.S. 211, 220-223, a decision cancelling the contract on the footing of the charges made by the Secretary and now sustained by the court below, with the allegations of unethical conduct that stud the cancellation action (Fdg. 38-39, R. 2652-54), the record of trial (Fdgs. 44-46, R. 2655; Fdgs. 77-78, R. 2664-65; Fdg. 103, R. 2671; R. 2622) and the opinion of the court below (*infra*, pp. A12-A16) will, necessarily, have significant and predictable collateral consequences.

This is so, not only in respect of the final months of the contract, as to which a judgment upholding cancellation would bar payment of petitioner's retainer, but also in respect of his percentage of claims recoveries successfully effected. One such recovery was obtained while the present case was *sub judice* in the court below. *Navajo Tribe of Indians* v. *United States,* 364 F. 2d 320, 347 (C. Cls., decided July 15, 1966). Another such recovery would be in respect of the sizeable victory in the Navajo-Hopi litigation, *Healing* v. *Jones,* which two Solicitors at different times had held to be a claims case (Fdgs. 65 and 66A, R. 2660-62). If the decision below stands, petitioner's demands for payment would undoubtedly be met by the defense of unclean hands (R. 361; par. 5, R. 1030; R. 2621-26; Conc. 17, R. 2678), and any effort to enjoin the Secretary from blocking payment under the rule of *Miguel* v. *McCarl,* 291 U.S. 442, 456—since the Navajo Tribe enjoys sovereign immunity (*United States* v. *United States F. & G. Co.,* 309 U.S. 506) petitioner could in no event proceed directly against his client—would encounter the defense of *res judicata.*

Consequently, even if this case were not finally determined until the next Term, it would not then be moot.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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NOVEMBER 1966.

APPENDIX

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL,
Secretary of the Interior, APPELLANT

v.

NORMAN M. LITTELL, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided September 2, 1966

Mr. Roger P. Marquis, Attorney, Department of Justice, with whom *Messrs. Herbert Pittle* and *Thos. L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellant.

Mr. Frederick Bernays Wiener, with whom *Mr. John F. Doyle* was on the brief, for appellee.

Before EDGERTON, *Senior Circuit Judge*, and BURGER and LEVENTHAL, *Circuit Judges*.

BURGER, *Circuit Judge:* This is an appeal by the Secretary of Interior from a permanent injunction prohibiting the Secretary from terminating Appellee's contract as

General Counsel of the Navajo Indian Tribe,[1] enjoining any interference with that contract and requiring the Secretary to deal with Appellee as General Counsel.[2]

The central issues are whether the Secretary has power to administratively terminate Appellee's contract for cause and, if so, whether on the record the Secretary acted properly within the scope of his claimed administrative powers.

Appellee has had professional relations with the Navajo Tribe for a long period of time, serving in two separate but related capacities. From 1947 to 1957 he was General Counsel; he also served as claims attorney for the Tribe, prosecuting claims against the United States. Effective August 8, 1957, Appellee contracted with the Tribe to continue the working arrangement in this dual capacity for an additional 10 years. The statutes governing Federal supervision of tribal activities require that such contracts be approved by the Secretary in his capacity as overseer of tribal interests[3] and the Secretary approved this contract.

As General Counsel of the Tribe, Appellee received a fixed contract fee for handling current and what may be called routine legal work. The fees paid to a general counsel are disbursed by the United States Government. In general, and for present purposes, Appellee's relationship

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[1] The Navajo Tribe consists of 100,000 American Indians occupying 24,000 square miles of territory in Arizona, New Mexico, Utah and Colorado; it is the beneficial owner of large assets, including more than eighty million dollars held in deposits in the United States Treasury. It is governed by an elected legislative body and a chairman; its affairs generally are subject to the jurisdiction of the Secretary of Interior.

[2] The continuance of Appellee's contract as claims attorney is not at issue in this case, but Appellee's performance of that contract and its relations to his duties and obligations as General Counsel are crucial factors.

[3] Rev. Stat. § 2103 (1878), as amended, 25 U.S.C. § 81 (1964).

to the Tribe was not unlike that of a private practitioner representing a business enterprise having a variety of recurring legal problems the scope of which is reasonably well established and sufficiently predictable to relate to a fixed retainer fee. The contract provided an annual retainer fee of $25,000 for Appellee, which was later increased to $35,000, and also provided for assistants or associate general counsel who were paid fixed salaries which in 1963 totaled $95,000.

In their capacity as claims attorneys, Appellee and an associate received no fixed fees; the contract provided they would be paid 10% of such amounts as they "recovered, saved, or obtained," by preparing, investigating and prosecuting the Tribe's claims against the United States Government. The 1957 contract provisions relating to the General Counsel services explicitly provided, with one exception not here relevant, that the duties and functions of the associate General Counsel attorneys were not to include services relating to claims work and that such associates were not to participate in any way in the 10% contingent fees for claims work. This separation of compensation and duties becomes of particular significance in reviewing the Secretary's termination of Appellee's General Counsel services.

The contract provided for termination for good cause by action of the Tribal Council subject to the approval of the Commissioner of Indian Affairs, who is a subordinate of the Secretary of the Interior. The contract provided for performance of work by the attorneys under the direction of the Tribal Chairman, the Advisory Committee and the Council.[4] In addition to proscribing use of staff attorneys

[4] Paragraph 3 of the contract states:

> 3. Direction by Chairman, Advisory Committee, and Council: The said attorneys shall perform the duties required of them under this contract upon the request and at the direction of the Chairman of the Navajo Tribal Council, subject to

on claims cases, the contract prohibited any change in Appellee's compensation during the first five years of the contract.

Between 1957 and 1962 eleven amendments were made to the General Counsel contract now before us. Seven of these amendments added associate attorneys to the General Counsel staff at fixed salaries paid by the Tribe; these added lawyers were engaged at Appellee's behest because of an increasing work load, and six of the amendments [5] to the contract explicitly prohibited Appellee from using these additional attorneys on contingent fee claims matters unless he secured the approval of the Advisory Committee of the Tribal Council and the Commissioner of Indian Affairs.

The background of the dispute giving rise to the Secretary's cancellation of Appellee's contract is important to an understanding of the issues. In March 1963 Raymond Nakai was elected Chairman of the Navajo Tribal Council on a platform including a demand for the dismissal of Appellee as General Counsel. In his campaign Nakai claimed that Appellee had improperly obtained an increase in his annual fee from $25,000 to $35,000. After his election the new Chairman requested Appellee to refrain from taking part in Tribal political affairs. The new Chairman was unable to secure a majority vote in the Tribal Council to terminate Appellee's contract. However, the Tribal Coun-

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such instructions as he may receive from time to time from the Advisory Committee or the Tribal Council. The General Counsel shall report to the Tribal Council at any regular or special meeting on any matters pertaining to the legal affairs of the Tribe when in his opinion or that of the Chairman, the Advisory Committee, or the Tribal Council, the best interests of the Tribe so require.

[5] The seventh, Amendment Eleven, allowed the newly added General Counsel attorney to work on claims cases; this was not authorized, however, by the Tribal Council resolution on which Amendment Eleven purported to be based.

cil's Advisory Committee did adopt a resolution calling on the Secretary of Interior to "investigate, audit and terminate" Appellee's contract for various reasons including an expressed fear that Appellee was using the time and services of salaried staff attorneys on Appellee's claims work covered by the 10% contingent fee contract.

After the Advisory Committee had requested the Secretary to investigate Appellee's performance and conduct, the Solicitor of the Department of Interior sent a memorandum to the Secretary in October 1963 in which he suggested that if General Counsel staff attorneys had worked on Appellee's contingent fee claims cases without authority, the Tribe could offset the value of such professional time against any contingent fee later to become due under the claims agreement or, alternatively, could cancel Appellee's General Counsel contract. The Secretary then sent a copy of his Solicitor's memorandum to Appellee advising him that he would not "take any action pursuant to this memorandum until you have had a fair and full opportunity to controvert any or all of the points which are raised in it."

Subsequently the Secretary received two additional memoranda from his Solicitor; in one the Solicitor advised termination of Appellee's fixed fee contract as General Counsel unless it developed that the factual basis of the memorandum was incorrect. The Secretary then sent copies of both memoranda to Appellee, at the same time suspending and withdrawing approval of his General Counsel contract. The Secretary also stated his intention to terminate the General Counsel contract unless Appellee could "adduce convincing evidence that the conclusions justifying . . . termination are unwarranted." This communication from the Secretary concluded: "I have directed that you shall have a full and fair opportunity to present to the Solicitor any evidence which you have by way of explanation or exculpation. I would suggest that you promptly submit such evidence directly to the Solicitor."

Appellee failed to reply to the Secretary but commenced in November 1963 the litigation now under review, obtaining in the District Court a preliminary injunction barring any interference with his contract pending litigation. On appeal this Court by a divided vote affirmed the District Court, explicitly reserving judgment on the merits.[6]

Subsequently the suit was tried on the merits and the District Court granted the permanent injunction[7] now under review, the District Court holding that the Secretary lacked authority to terminate Appellee's contract and alternatively that, assuming the Secretary had such authority, his action was arbitrary and capricious. The District Court found as a fact that Appellee had "sometimes used and condoned the use of general counsel attorneys on claims litigation" without securing the approval of the Tribal Council and Indian Commissioner as required by the contract, but concluded, as a matter of law, this was not good cause for cancellation of the contract. The District Court reasoned that the Navajos had other adequate remedies for this unauthorized use of staff attorneys such as offsetting a claim for the use of general counsel attorneys against any contingent fees which might become due in future.

The Secretary asserts that his authority to cancel the contract of a general counsel for an Indian tribe by administrative action is inherent in powers delegated to him by Congress. One statute delegates to the Secretary the supervision of the affairs and public business of Indian tribes;[8] another charges him with "the management of all Indian affairs and of all matters arising out of Indian relations."[9] We agree with the Government's view of the Secretary's powers under the statutory scheme.

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[6] Udall v. Littell, 119 U.S.App.D.C. 197, 338 F.2d 537 (1964).

[7] Littell v. Udall, 242 F.Supp. 635 (1965).

[8] Rev. Stat. § 441 (1878), as amended, 5 U.S.C. § 485(10) (1964).

[9] Rev. Stat. § 463 (1878), 25 U.S.C. § 2 (1964).

In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively. Courts have taken this approach with respect to various aspects of Indian life,[10] recognizing that "this statute furnishes broad authority for the supervision and management of Indian affairs and property commensurate with the obligation of the United States."[11] Mr. Justice Van Devanter, while a Circuit Judge, said:

> In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage.[12]

Over a period of many years relations between tribes and their attorneys have been a source of deep Congressional concern;[13] the history of imposition on and overreaching of Indian tribes helps explain why Congress vested

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[10] See, *e.g.*, Parker v. Richard, 250 U.S. 235 (1919) (supervision of lease income); United States v. Birdsall, 233 U.S. 223 (1914) (authority to make recommendations concerning sentences for violations of laws on liquor traffic with Indians); *cf.* Boesche v. Udall, 373 U.S. 472 (1963) (general managerial power over public lands includes authority to cancel administratively an invalid lease).

[11] Armstrong v. United States, 306 F.2d 520, 522 (10th Cir. 1962).

[12] Rainbow v. Young, 161 Fed. 835, 838 (8th Cir. 1908).

[13] See S.Rep. No. 8, 83d Cong., 1st Sess. (1953).

broad powers in the Secretary for the protection of the Indians. Appellee contends, however, that the existence of two statutes directing the Secretary to take certain actions with respect to contracts between tribes and their attorneys requires a strict interpretation of the Secretary's powers under the general supervisory provisions. The thrust of Appellee's contention is that the very passage of the two specific statutes indicates a Congressional view that the Secretary was not granted authority to cancel a general counsel contract. The two statutes Appellee relies on provide that a contract for legal services must be approved by the Secretary[14] and require a determination by the Secretary that the contract has been fulfilled before payments are made by the United States.[15]

These statutes were enacted in 1871 and 1872, subsequent to enactment of the two generalized statutes delegating supervision of the Indians to the Secretary.[16] This, Appellee argues, indicates the Secretary was not granted cancellation authority by the general statutes, for, if he had been, there would have been no need to add the specific sections directing him to take certain actions with respect to attorneys' contracts. Appellee seeks to buttress this argument by pointing to a third statute which followed the enactments of 1871 and 1872. The Act of April 27, 1874,[17] provided that contracts entered into prior to the 1872 Act also had to meet the requirements of the 1872 Act. Ap-

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[14] Rev. Stat. § 2103 (1878), as amended, 25 U.S.C. § 81 (1964).

[15] Rev. Stat. § 2104 (1878), 25 U.S.C. § 82 (1964).

[16] 25 U.S.C. § 81 is derived from Acts of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 570, and May 21, 1872, ch. 177 §§ 1, 2, 17 Stat. 136; 25 U.S.C. § 82 is Act of May 21, 1872, ch. 177, § 3, 17 Stat. 137. 25 U.S.C. § 2 is derived from Acts of July 9, 1832, ch. 174, § 1, 4 Stat. 564, and July 27, 1868, ch. 259, § 1, 15 Stat. 228; 5 U.S.C. § 485(10) originated in Act of March 3, 1849, ch. 108, § 5, 9 Stat. 395.

[17] Act of April 27, 1874, ch. 135, 18 Stat. 35.

pellee argues this "shows virtually as a matter of mathematical certainty" that the Secretary does not have the power to cancel by administrative action. We cannot accept this contention or the premise of statutory interpretation which underlies it. Specific Congressional action to remedy an evil does not by itself indicate the Executive Branch lacks authority to act under other statutory provisions.[18] *Cf. Copper Plumbing & Heating Co.* v. *Campbell*, 110 U.S. App.D.C. 177, 182, 290, F.2d 368, 373 (1961).

We do not read the specific statutes relied on by Appellee as limiting the Secretary's powers under other statutes.[19]

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[18] A contemporaneous report indicates Congress was concerned with remedying a particular situation and did not consider whether its efforts were legally imperative. It indicates, moreover, that administrative laxity was at least partially to account for the legislative initiative. The temper of Congressional thinking is reflected in one paragraph of the Committee Report:

> And the committee expresses its surprise and regret that the authorities controlling Indian affairs have heretofore neither directed their own attention nor called the attention of Congress to the great and revolting waste of the patrimony of the Indians, and the continued and serious difficulties between them and the white people, caused by these corrupt and corrupting middle-men, who are shrewd enough to escape the evil results of their own villainies.

House Committee on Indian Affairs, *Investigation of Indian Frauds*, H.R.Rept. No. 98, 42d Cong., 3d Sess. 3 (1873).

[19] While we need not speculate to counter Appellee's speculation, it should be noted that applying Appellee's type of argument to another relevant statute could lead to an inference that Congress believed the Secretary possessed the authority to cancel. The Act of June 26, 1936, ch. 851, 49 Stat. 1984, 25 U.S.C. § 81a (1964), provides that claims contracts made before that date could be for an indefinite duration, thus lifting the restrictions of Section 81 for a limited category of contracts. One of its provisos is "That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement." Appellee argues that this proviso merely permits the Secretary to cancel

What can be drawn from the statutory scheme as a whole is that Congress has long been extremely sensitive concerning contracts between attorneys and Indian tribes. To interpret specific statutes in a manner which would plainly hinder the Secretary's efforts to oversee and protect Indian interests would hardly give effect to the overall Congressional purpose. To read the statutes as Appellee contends, so that the Secretary's approval once given would bar his cancellation of a contract on any grounds, would mean that these enactments would operate as protection of lawyers rather than of the Indian tribes. Congress had no such intent.

Moreover, the Secretary is required to investigate an attorney's performance to determine whether he has fulfilled his contract before any payments are made under it.[20] It can hardly be thought that Congress intended the Secretary would pay an attorney from tribal funds held in trust if the amounts were unreasonable or if the lawyer had not been faithful to the client's interests, or was guilty of any other significant misconduct.

We hold that the broad authority vested by Congress in the Secretary to oversee Indian affairs, particularly

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contracts which were being validated by the main body of the Section, *i.e.*, ones for an indefinite duration. This overlooks the fact that by using the phrase "limit the power" the proviso assumes an existing power and does not create a power. Such power, moreover, would have to relate to cancellation for other reasons than that the contract was of indefinite duration; since Section 81 made such contracts null and void, the Secretary would neither be required nor able to "cancel" them. The proviso, furthermore, speaks in terms of cancellation for proper cause. To say that this allows the Secretary to cancel those contracts inimicable to the interests of the Indians which are for an indefinite duration but not those which, while equally unjust, happened to be for a fixed time would be to impute to Congress a meaningless distinction.

[20] Rev. Stat. § 2104 (1878), 25 U.S.C. § 82 (1964).

in light of the long history of concern over tribal relations with attorneys, includes the power to cancel contracts between a tribe and its attorneys for cause by appropriate administrative action. The Secretary's approval of the contract is no bar to such cancellation for cause.

The final question is whether the Secretary's action was supported by substantial evidence or whether on the other hand it was arbitrary and capricious.[21]

The action of the Secretary was predicated on charges of violation of contract terms by Appellee and failure to perform faithfully the duties of legal counsel and adviser. The Secretary charged Appellee with violating his professional obligations toward the Navajo Tribe

(1) by increasing his compensation from $25,000 to $35,000 per year in 1961 without disclosing to the Tribe that such increase was prohibited by express contractual provisions;

(2) by reclassifying *Healing* v. *Jones* as a "claims" case under the purported authority of a Tribal Council resolution which did not in terms or intent authorize a reclassification of that case, an action which constituted a breach of trust and overreaching by placing Appellee in position to receive a 10% fee on the property involved in *Healing* v. *Jones* over and above his fixed fee as General Counsel; and

(3) by using staff attorneys employed and paid by the Tribe as assistants to the General Counsel to perform work on Appellee's contingent fee claims cases at the Tribe's expense, in violation of express contract terms and without full dis-

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[21] Administrative Procedure Act § 10(e), 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1964).

closure of the facts either to the Tribe or the Secretary.

At the outset we should note that if substantial evidence is found to support any one of these charges, the Secretary's action must be sustained since each of the charges goes to the very heart of the fiduciary duty of an attorney toward his client. In the posture of this case the burden rests on the Secretary, however, to show that the factual findings are plainly erroneous because unsupported by evidence or that the legal conclusions made by the District Court based on these findings are incorrect as a matter of law.[22]

Several factors stand out in this case. First, an attorney engaged in controversy with a client in relation to a contract for professional services is in some respects in a different posture from an ordinary litigant involved in an arms length commercial transaction; as an attorney he is bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client. Second, Appellee came into the District Court seeking equitable relief in the stringent form of injunction against governmental action. His burdens in these circumstances were heavy indeed and we must evaluate the action of that Court in light of these hornbook standards. It is elementary, of course, that one seeking equity must do equity and must show "cleans hands" at the threshold. And this being so as to the ordinary seeker of equity it can surely be no less true when an attorney seeks extraordinary equitable relief virtually constituting specific performance of a profes-

[22] The 118 Findings of Fact and 23 Conclusions of Law cover 37 printed pages of the Joint Appendix. Many of the Findings and Conclusions are irrelevant to the basic controlling issues of Appellee's *bona fides* in his relations with his client.

sional services contract[23] against his client and against the client's guardian, as the Secretary of Interior is in this context.[24]

The basic elements of the attorney-client relationship are not changed because the contract for services is expressed in a formal written contract. Indeed the very making of a formal contract and its performance impose a high duty on the attorney because he is dealing in an area in which he is expert and the client is not and as to which the client must necessarily rely on the attorney. This, among other factors, suggests the crucial importance of the supervision and overseeing by the Secretary of all relations between Indian tribes and attorneys. This is not to suggest that a formal contract is unimportant but rather that a formal long-term contract, superimposed on the normal attorney-client relationship, alters the relationship only by adding new dimensions of duties and obligations on the attorney.[25]

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[23] The Government makes forceful arguments on the lack of judicial authority to enforce virtual specific performance of a contract for personal, confidential services. In a not dissimilar situation the Eighth Circuit rejected recourse to equitable relief to reinstate an attorney in his employment as legal adviser to an Indian tribe. "The relationship of attorney and client is such as to require perfect confidence between the parties, and, of course, could not be continued by a decree in equity against the will of either party." *Adams* v. *Murphy*, 165 Fed. 304, 311 (8th Cir. 1908).

[24] That greater independence for Indians is the laudable ultimate objective does not undermine or impair the Secretary's duty to help protect the Indians from their own improvident acts or from overreaching by outsiders. Indian wards, like individual wards, may often require the intervention of the guardian to prevent unwise action or dissipation of assets.

[25] Contracts made by persons in fiduciary relationship with the other party are always subject to close scrutiny and often treated as presumptively voidable. *E.g.*, Spilker v. Hankin, 88 U.S.App. D.C. 206, 188 F.2d 35 (1951); Neary v. Markham, 155 F.2d 485 (10th Cir. 1946).

The background revealed by this record shows a steadily deteriorating relationship between Appellee and the Tribe for some period before cancellation of the contract. The indications are found in Chairman Nakai's election in 1963 on a platform of "Littell-must-go", in the divided Tribal Council, and finally in the Advisory Committee's demand that Appellee's conduct be investigated by the Secretary and that he be dismissed as General Counsel. The record overflows with bitter charges and counter charges attacking not only conduct but motivation of "opponents"; it reflects an atmosphere which negated any possibility of continuance of a normal professional relationship between Appellee and the Tribe's Chairman, the Advisory Committee and some members of the Tribal Council. The barest recital of the unseemly squabble reflected in the record is sufficient to demonstrate that it must be the ultimate responsibility of the Government in the person of the Secretary to see that such controversies do not develop, or if they do, to terminate them by administrative action. The interests of the Navajos demanded that the controversy cease.

The Secretary's action must be viewed against this background, although we need not pass on all of the charges and counter charges; it is enough that undisputed evidence and indeed admissions of Appellee showed that he had used salaried staff lawyers of the Tribe to perform services on claims cases for which he had contracted to supply all legal services for a 10% contingent fee. His contingent fee engagement might call for him to hire numerous legal aides but this would be for his own account and at his own expense. His use of salaried Tribal employees to perform his work on claims cases without first obtaining the approval prescribed by the contract was a clear violation of the contract; his failure to make full disclosure to the client and the Indian Commissioner was a further breach of his fiduciary duty. This was more than "intermixture" or "commingling" of Tribal assets with his own

assets; it was an affirmative use—or misuse—of assets of the Tribe for his own interest.

It is argued that this is not significant for two reasons: first, that the Tribe would ultimately receive 90% of the benefit of these borrowed attorney services and, second, that as claims were collected an adjustment for the borrowed services could be made, presumably by reimbursing the Tribe by way of offset to the extent of the value of such services. There are numerous fallacies in these theories.

By the very nature of the situation only Appellee could know how much time had been devoted by General Counsel staff attorneys to claims work, and for him to know, precise records allocating time between claims and routine counsel services would be required. In his testimony in the District Court Appellee conceded that allocation was difficult. But the very difficulty of making such allocation —all of which was under his immediate control—is one of the reasons why such interchange should not have occurred. Very likely this was a factor which led the Tribe to prohibit such use of Tribal attorneys on claims cases except with careful safeguards. If this contract proviso was unworkable or unduly onerous it should never have been accepted or, having been, should have been changed.[26] We noted earlier that Nakai, in his campaign for election as Chairman, contended Appellee was wrongfully using staff attorneys on claims cases; these issues obviously developed over a period prior to 1963.

The argument that the Tribe would benefit 90% from Appellee's use of staff attorneys is specious on its face. It is no defense for a fiduciary to say that he will share the profits of assets he borrows from a trust account and

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[26] Appellee points to nothing in the record to show that he instructed staff attorneys to keep records which would allow for an accounting adjustment for the borrowed services, assuming arguendo this would solve the problem.

invests, whether in a speculative enterprise or in a "blue chip."

Furthermore, if the claims cases came to naught no fund would exist for offset adjustments, since the Tribe's only obligation for payment for any legal services on claims cases was contingent on a recovery. In any event, the availability of an offset remedy if and when contingent fees became due could not affect the alternative remedy of administrative cancellation of the contract for misuse of staff attorneys. Indeed, the probabilities of success or failure of the claims litigation are irrelevant to the propriety of Appellee's use of staff attorneys to prosecute the claims cases. The happy flowering of an unauthorized investment of trust assets by a fiduciary does not alter the nature of the original diversion.

It is not necessary for us to treat all of the multitude of Findings and Conclusions of the District Court but only to determine the narrow question whether there was a rational and valid basis for the Secretary to conclude that Appellee's conduct and performance of his contract afforded a legally sufficient basis for cancelling that contract. Our analysis of the record evidence on this score, against the statutory background, makes it clear that, apart from all other factors, Appellee's admitted unauthorized use of Tribal staff attorneys on claims cases constituted adequate grounds for cancelling his contract as General Counsel.

Once the District Court found, as Appellee's admissions required, that Appellee had diverted Tribal assets in the form of services of General Counsel staff attorneys to work on claims cases, a conclusion of law was compelled that the Secretary had adequate grounds to terminate Appellee's contract. This makes it unnecessary to deal with other findings of fact or conclusions of law. Accordingly the judgment for a permanent injunction is vacated and judgment entered in favor of Appellant.

Reversed and remanded.

APPENDIX B

JUDGMENTS BELOW

(1) Judgment of Affirmance

[Caption omitted]

Judgment

This case came on to be heard on the record on appeal, from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment for a permanent injunction appealed from in this case is vacated, and this case is hereby remanded to the District Court with directions to enter judgment in favor of appellant.

Per Circuit Judge Burger

Dated: September 2, 1966.

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(2) Order Denying Rehearing in banc

[Caption omitted; filed October 14, 1966.]

Before: Bazelon, Chief Judge; and Fahy, Danaher, Burger, Wright, McGowan, Tamm and Leventhal, Circuit Judges, in Chambers.

Order

On consideration of appellee's petition for rehearing *en banc* and there not being a majority of the circuit judges of this circuit in favor of a rehearing of the above-entitled case by the court *en banc*, the petition for rehearing *en banc* is hereby denied.

For the Court:

Acting Chief Judge.

Circuit Judge Danaher would grant appellee's petition for rehearing *en banc*.

Chief Judge Bazelon and Circuit Judges Fahy, Wright and McGowan did not participate in the foregoing order.

APPENDIX C

STATUTES AND NAVAJO TRIBAL CODE PROVISIONS INVOLVED

I. *United States Statutes:*

1. R. S. § 441, as amended (5 U.S.C. § 485), provides as follows:

"§ 485. Duties of Secretary

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

* * * * * *

"10. Indians."

[*Note:* The new codification of Title 5 of the United States Code, Act of Sept. 6, 1966, Public Law 89-554, 80 Stat. 378, neither renumbers nor repeals the foregoing provision.]

2. R.S. § 463 (25 U.S.C. § 2) provides as follows:

"§ 2. Duties of Commissioner

"The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

3. 25 U.S.C. § 636, drawn from § 6 of the Act of April 19, 1950, c. 92, 64 Stat. 44, 46, provides as follows:

"§ 636. Adoption of constitution by Navajo Tribe; method; contents

"In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by sections 631-640 of this title, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may pro-

vide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the same manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship."

4. R.S. § 2103, as amended (25 U.S.C. § 81), provides as follows:

"§ 81. Contracts with Indian tribes or Indians

"No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the

United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

"Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

"Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the

other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

5. R.S. § 2104 (25 U.S.C. § 82) is not involved in the questions presented by this petition.

6. The Act of April 29, 1874, c. 135, 18 Stat. 35, provides as follows:

"That hereafter it shall not be lawful for any United States officer, or other person under its employ or control, to recognize the binding force or legality, or in any manner sustain or enforce or counsel, or give any aid or assistance to sustain or enforce, any contract or agreement made by any person or persons, or corporation, with any band, tribe, or nation of Indians, or individual Indian or Indians, not a citizen of the United States, entered into prior to the date of the act of Congress entitled 'An act regulating the mode of making private contracts with Indians,' approved May twenty-first, eighteen hundred and seventy-two, for the payment or delivery of any money or other thing of value, in present or prospective, or for the granting or procuring any privilege to him or her, or any other person or persons, or corporation, in consideration of services for, or advancements made to, said Indians relative to their lands, or to any claim growing out of or in reference to annuities, instalments, or other moneys, claims, demand, or thing under laws or treaties with the United States, or official acts of any officer thereof, or in any way connected with or due from the United States, unless such contract or agreement was reduced to writing and duly signed by the parties in interest thereto at the time it was entered into and fully made known to the parties at the time the contract was signed, and then not until such original written contract shall first have been presented to and examined by the Secretary of the Interior and the Commissioner of Indian Affairs, and these facts by them severally endorsed thereon,

and a copy of said contract and of any assignments that may have been made thereon duly entered of record in the office of the Commissioner of Indian Affairs.

"SEC. 2. That in addition thereto there shall also be filed in said Commissioner's office, and retained therein as official papers, and be examined by said Commissioner and Secretary, and that fact indorsed on them, the following statement of facts touching each and all such contracts and agreements so presented; which statements shall be sworn to specially by all and severally the person or persons claiming interest in and seeking the support and enforcement of such contract or agreement, and not by agent or attorney: First, that the writing presented for examination and record, as provided for in the first section of this act, and purporting to be the original contract or agreement, is in fact such, and that it was entered into and reduced to writing at the date and for the purposes it purports to have been made and executed; secondly, such sworn statement shall give particularly the names of the real parties in interest in the original contract or agreement, naming them if not named in the written contract or agreement, and if either of the contracting parties is a band, tribe, or nation of Indians, or a corporation or firm, the name of the person, officer, or agent contracting in their behalf, together with his authority for so doing shall be specially stated; thirdly, a particular statement of all and singular the services rendered or the thing or things done under such contract or agreement prior to said filing, with those things to be done or rendered, together with a particular statement of any and all moneys paid or advanced by either party under such contract or agreement, giving in all cases the time, place, and real value of services rendered, or thing or things done, or the kind and manner of payment, whether in money, property, or credits, up to the date of the filing of the

said sworn statement; fourthly, state specifically whether the original contract or agreement had been submitted to any Secretary of the Interior, Commissioner of Indian Affairs, superintendent of Indian affairs, Indian agent, commissioner, or other person having official control of or connection with Indian affairs, giving the time when, place where, and person by name to whom such submission was made, and whether by said officer indorsed or not, or whether any such officer was cognizant of such contract or agreement having been made, though not submitted to him for approval.

"SEC. 3. That the Secretary or Commissioner of Indian Affairs is hereby empowered to require, in writing, any additional facts or proofs that may be necessary to aid in determining the true character of the contract or agreement, or assignment thereof.

"SEC. 4. That no such contract or agreement shall be recognized by any officer or employee of the United States until the Secretary of the Interior shall, after full consideration of any such contract or agreement, together with the proofs and papers in this act required to be filed, and such as the Secretary of the Interior or Commissioner of Indian Affairs may require in addition thereto, the Secretary of the Interior shall consider to be just and reasonable, and not tainted with fraud, and not exorbitant in its demands: *Provided*, That the Secretary of the Interior shall in all cases enter, in writing, on such original contract, on the record in the office of the Commissioner of Indian Affairs wherein such original contract is recorded, an official statement, showing that the contract or agreement and proofs have been filed in accordance with the provisions of this act and considered by him, and in his opinion said contract or agreement or assignments thereof are not exorbitant and not fraudulent, and that they are just, the same shall be valid.

"But if, in the opinion of the Secretary of the Interior, such contract or agreement, or the assignment thereof, is fraudulent or exorbitant, he shall officially enter his rejection, in writing, upon the record of such contract or agreement, and they shall not be considered of binding force by any officer or employee of the United States.

"SEC. 5. That it is hereby made the duty of the Secretary of the Interior to cause an investigation to be made of all existing contracts or agreements, within the purview of this act, now on file in his office, or of the office of the Commissioner of Indian Affairs, or any other office or bureau under his control, and by special notice to the party or parties in interest compel, in the case of each such contract or agreement so found on file, the same strictness of official examination, and indorsement, record and sworn statement of fact, as is required by the several provisions of this act: *Provided,* That the investigation of facts touching the character of any contract or agreement contemplated by this act may be made by a commissioner appointed by the President for that purpose, who shall report all such facts to the Secretary of the Interior in writing."

II. *Navajo Tribal Code:*

7. Title 2, Section 101, N.T.C., provides as follows:

"§ 101. Composition of governing body

"The Tribal Council shall be the governing body of the Navajo Tribe and shall consist of 74 delegates."

8. Title 2, Section 281, NTC., provides as follows:

"§ 281. Creation of office of Chairman; term

"(a) There shall be one Chairman of the Navajo Tribal Council, and he shall hold office for a term of four years.

"(b) There shall be no limitation on the number of terms of office which a Chairman may hold."

9. Title 2, Section 284, N.T.C., provides as follows:

"§ 284. Powers and duties

"(a) The Chairman of the Navajo Tribal Council may yield the chair to the Vice-Chairman in order to take part in the sessions of the Tribal Council. He may make recommendations and appoint committees. He shall be the Chairman of the Advisory Committee, and he may advise and assist the Government on any action or policy adopted by the Tribal Council.

"(b) The Vice-Chairman shall be subordinate in authority to the Chairman and shall assist in carrying out the duties of the Chairman as the Chairman shall direct.

"(c) The Vice-Chairman of the Tribal Council shall serve as Chairman of the Tribal Council when the Chairman is unable to perform his duties.

"(d) In the absence of the Chairman, the Vice-Chairman shall preside over meetings of the Council and of the Advisory Committee.

"(e) Responsibility for directing and supervising the personnel and executive or business staff of the Tribe shall be in the Chairman, and whatever duties in respect thereto may hereafter be carried out by the Vice-Chairman shall be in accordance with the Chairman's directions and instruction."

10. Title 2, Section 1173(c), N.T.C., provides as follows:

"§ 1173. Employment; limitations

* * * * *

"(c) No person shall be engaged to render services which are subject to the requirements of section 2103 of the Revised Statutes of the United States (25 U.S.C. § 81) without the prior individual approval of the Navajo Tribal Council."

APPENDIX D

ADDITIONAL CHARGES MADE BY SECRETARY AT TIME OF PURPORTED CANCELLATION, HELD GROUNDLESS BY DISTRICT COURT, AND NOT RELIED ON FURTHER BY COURT OF APPEALS

Of the three charges made by the Secretary at the time he purported to terminate petitioner's contract, only one, the use of general counsel attorneys on claims cases, was relied on by the court below; see discussion above, pp. 6-9, 11-12, 15-17.

The other two charges then made were not discussed in the opinion below. We summarize these other two charges here, together with the proof adduced at the trial, and show the disposition made of each by the district court.

(i) *Raise in compensation effected by Amendment No. 9*

Article 4(a) of the basic contract as negotiated provided for increases in the attorneys' compensation by provisions in the Tribal budget, effective upon the approval of the budget by the Tribal Council (R. 40). This provision was approved in the Interior Department subject to two conditions, first that such increases must also be approved by the Commissioner, second that neither the compensation of petitioner as General Counsel nor that of Mr. Alexander, one of his assistants, should be increased for five years (R. 49, ¶¶ 3, 4).

Four years later, while petitioner was abroad, the Tribal Council voted to increase his compensation, not by budget item, but by formal amendment of the basic contract, in respect of which normal amendment procedures were followed. That amendment, No. 9, was approved by the Secretary personally, after his subordinates had considered at least two supporting memoranda, with a statement that "I find it to be in the best interest of the Indians" (Fdgs. 49-52, R. 2656-57).

The record shows that the five year limitation was twice waived by formal amendments in respect of Mr. Alexander,

once after two years, the second time after three (Amendments 5 and 6, R. 68-79). The record further shows that, while Amendment No. 9 was under consideration in the Department of the Interior, two field officials questioned whether the proviso could be lifted, and that their objections were forwarded to the Solicitor (R. 1911-14, inclosing R. 1949-50).

The increase effected by Amendment No. 9 was not mentioned in the Solicitor's October Memorandum, nor was it referred to by the Secretary when he conferred with petitioner on October 11; it first appeared as an accusation in one of the November Memoranda (Fdgs. 53-54, R. 2657). When the Secretary testified, he characterized his earlier approval as merely routine and perfunctory (Fdg. 52, R. 2657).

The district court found as a fact that there was nothing before the Department of the Interior in November 1963 regarding Amendment No. 9 that had not been before it when that amendment was approved by the Secretary (Fdg. 55, R. 2657), and held as a matter of law, first, that the parties were free to waive the five year limitation provided such waiver was approved by the Secretary (Conc. 9, R. 2676), and, further, that even if the Secretary had legal power to terminate the contract, the charge made in connection with Amendment No. 9 would not have constituted good cause for such a step (Conc. 10, R. 2676).

The court below did not mention the raise in compensation effected by Amendment No. 9 as a ground justifying the Secretary's cancellation of petitioner's contract.

(ii) Classification of Healing v. *Jones as a claims case effected by Amendment No. 11*

At the request of the Undersecretary of the Interior, who sought a definition of what were and what were not claims cases within petitioner's contract, Chairman Jones of the Navajo Tribal Council listed *Healing* v. *Jones,* 174 F. Supp.

211 (D. Ariz.), 210 F. Supp. 125 (D. Ariz.), affirmed, 373 U.S. 758, the Navajo-Hopi litigation, as a claims case (Fdg. 63, R. 2660). Solicitor Stevens disagreed, and petitioner in turn disagreed with Stevens; thereafter, when petitioner furnished copies of the Advisory Committee meeting of September 24, 1957, Stevens changed his opinion, and concurred in holding *Healing* v. *Jones* to be a claims case (Fdgs. 64-65, R. 2660-61).

The Advisory Committee, at the cited 1957 meeting, negotiated the terms of petitioner's contract pursuant to authorization from the Tribal Council, and at that meeting petitioner fully and frankly disclosed why in his view the Navajo-Hopi dispute would become a claims case once Congress had authorized the litigation (Fdg. 66, R. 2661). Similar statements were repeatedly made thereafter by petitioner to the Navajo Tribal Council (Fdg. 68, R. 2662).[1]

Amendment No. 11, which made *Healing* v. *Jones* a claims case in terms, was approved by Solicitor Barry after obtaining additional data from petitioner, and was then approved by the Secretary (Fdg. 66A, R. 2661-62).

Later, in both his October and November Memoranda, in which he held *Healing* v. *Jones* to have been improperly classified as a claims case, Barry did not cite *Healing* v. *Jones*, 174 F. Supp. 211 (D. Ariz.), where the United States

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[1] Finding 65 (R. 2660-61) shows that when Solicitor Stevens changed his mind on January 19, 1961, and agreed with petitioner that *Healing* v. *Jones* was a claims case, he relied on the Advisory Committee minutes. See Pl. Ex. I, K (R. 2060-61, 2062-2134), incorporated by reference into the finding. Those minutes were not returned to petitioner by the Interior Department until two months later (Pl. Ex. J, R. 2061).

Finding 66 (R. 2661) shows that full disclosure was made by petitioner, a finding that rests on the written minutes themselves (PL. Ex. K, at R. 2087, 2090, 2092, 2094-97). Moreover, Finding 73 (R. 2663) shows that those same minutes were before Solicitor Barry prior to November, as Barry himself admitted (R. 1733, 1761).

had sought to dismiss the litigation for want of jurisdiction; did not mention his personal approval of Amendment No. 11; and while asserting that the Tribal Council minutes did not show any consideration being given to the status of the case, failed to disclose that such consideration was in fact given by the Advisory Committee which the Tribal Council had authorized to conduct the negotiations. (Fdgs. 69-71, R. 2662-63.)

The district court found as a fact that nothing that was available to Barry in October and November 1963 was not equally available to him when he approved Amendment No. 11 (Fdg. 72, R. 2663), and further found that some at least of the minutes that reflected petitioner's views regarding *Healing* v. *Jones* were before Barry in October and November 1963 (Fdg. 73, R. 2663).

No fee has been formulated by petitioner in respect of *Healing* v. *Jones*, no fee has been negotiated, and no voucher has been submitted by him (Fdg. 74, R. 2663-64); contrariwise, his adversary, counsel for the Hopis, has advised the Hopi Tribal Council that *Healing* v. *Jones* was a claims case (Fdg. 75, R. 2664).

The district court held that the status of that case was a matter of law under the original contract, that petitioner's part in negotiating Amendment No. 11 involved neither overreaching nor unethical conduct, that at the very weakest the status of *Healing* v. *Jones* was a debatable question on which reasonable lawyers might differ, and that petitioner's insistence that it was a claims case, "particularly after he had persuaded Solicitor Stevens to adopt that view after first rejecting it, did not as a matter of law justify the assertions against the plaintiff, in the October and November Memoranda and at the trial, that in so classifying that case he had been guilty of improper conduct" (Conc. 13-15, R. 2677). Accordingly, the district court concluded that petitioner's activities under the present heading did

not constitute good cause for the termination of his contract (Conc. 16, R. 2678).

The court below did not mention the change in classification of *Healing* v. *Jones* effected by Amendment No. 11 as a ground justifying the Secretary's cancellation of petitioner's contract.[2]

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[2] The court below in its first opinion had strongly intimated (338 F. 2d at 541, notes 11-13) that *Healing* v. *Jones* was indeed a claims case, but there it did not purport to voice any opinion on the merits (338 F. 2d at 542).